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No. 77-686

# In the Supreme Court of the United States

OCTOBER TERM, 1977

FRANCOIS CHIAPPE, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The court of appeals affirmed without opinion (Pet. App. 37-38). The opinion of the district court (Pet. App. 33-36) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 20, 1977. The petition for a writ of certiorari was filed on November 14, 1977, and is therefore substantially out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



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## QUESTIONS PRESENTED

1. Whether petitioner's indictment was obtained by the deliberate presentation of misleading testimony to the grand jury.

2. Whether petitioner's presence at trial was secured by illegal actions of the United States government.

3. Whether petitioner was denied a fair trial because the government failed to produce court records of his prosecution for bank robbery in Argentina in 1968.

4. Whether the district court abused its discretion in admitting into evidence certain items seized from petitioner and his wife after the termination of the conspiracy.

5. Whether petitioner was denied effective assistance of counsel.

## STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiracy to distribute heroin, in violation of 21 U.S.C. (1964 ed.) 173 and 174. He was sentenced to 20 years' imprisonment and fined $20,000. The court of appeals affirmed without opinion (Pet. App. 37–38).

The evidence at trial showed that petitioner, a French national residing in Buenos Aires, Argentina, was a principal participant in a major heroin smuggling conspiracy operating between France, South America, and the United States from 1965 until early 1968. Besides initially financing the operation (Tr.



99–100), petitioner provided the French heroin connection for co-conspirators Francois Rossi and Michel Nicoli, two other French nationals residing in Buenos Aires, who transported the heroin to buyers in New York (Tr. 101–110, 127–135, 142–151, 157–163, 191–199, 283–287). Later, in 1967, the conspirators recruited Miguel Russo to assist them in transporting the heroin from South America and France to the United States (Tr. 174–175, 204–205, 215–216, 219–221, 227–228, 231–232, 235–238, 278–280).[1]

## ARGUMENT

1. Petitioner contends (Pet. 8–11) that the government obtained his indictment by the deliberate presentation of misleading testimony to the grand jury. Specifically, petitioner claims that the government was aware from its pre-indictment interviews with Nicoli that he had repeatedly asserted that the conspiracy involving petitioner had terminated in December 1967, yet the government deceived the grand jury by "conveniently omitt[ing]" (*id.* at 9) any reference to the termination of the conspiracy in its questioning of Nicoli in order to avoid the statute of limitations.[2] These claims are without merit.

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[1] After pleading guilty to various narcotic offenses, Nicoli testified for the government at petitioner's trial. Following a separate jury trial, Rossi was convicted on the same indictment. His conviction was affirmed on appeal. 545 F. 2d 814 (C.A. 2), certiorari denied, 430 U.S. 907. Russo was convicted along with petitioner and received the same sentence.

[2] Petitioner's indictment was returned on February 15, 1973. Thus, petitioner had to be involved in the conspiracy on or after February 16, 1968, to be convicted (Tr. 1094).

Nicoli testified at trial that he, petitioner and Rossi arranged a heroin trip in early 1968 (Tr. 278). According to Nicoli, he went to Miami on February 14, 1968, to pick up three kilos of heroin that were to be delivered from Buenos Aires (Tr. 279–280). Upon his arrival in Miami, however, Nicoli was questioned by customs agents for about two hours. He therefore proceeded to New York without the heroin and arranged with the buyer there to have a courier obtain the narcotics (Tr. 283–284). The buyer then paid Nicoli $28,000, which he split with petitioner and Rossi on February 16, 1968 (Tr. 284–287).

In response to the government's questions at trial, Nicoli admitted that certain statements he had made to federal agents prior to petitioner's indictment (Govt. Exs. 3500–4, 3500–5) were not completely truthful because he was then attempting to conceal petitioner's involvement (Tr. 624–633). Nicoli also told the jury that the heroin transaction mentioned during his grand jury testimony (see Pet. 9) actually occurred in March 1968 and was unrelated to the trip in February 1968 involving petitioner (Tr. 634–637).

Thus, petitioner simply alludes to inconsistent statements made by Nicoli of which the jury was fully aware. There is no evidence to suggest that the government obtained petitioner's indictment knowing that it was barred by the statute of limitations. Indeed, the district court explicitly charged the jury at trial that it had to acquit petitioner unless it found that he was involved in the February 16, 1968, drug transaction (Tr. 1386–1387).



2. Petitioner contends (Pet. 11–19) that his presence at trial was secured by illegal actions of the federal government. It is settled, however, that a court's power to bring a person to trial upon criminal charges is not impaired by his forcible abduction into the jurisdiction. *Ker* v. *Illinois,* 119 U.S. 436; *Frisbie* v. *Collins,* 342 U.S. 519. Even assuming that this rule is inapplicable where a government actively secures the defendant's presence in its jurisdiction through particularly shocking and abusive conduct (see *United States* v. *Toscanino,* 500 F. 2d 267 (C.A. 2)), the record in this case demonstrates that petitioner is not entitled to relief.

At a post-trial hearing on January 7, 1977, petitioner claimed that on May 21, 1976, he was forcibly and violently seized by unknown individuals in Argentina and was beaten, blindfolded, bound in a strait jacket and confined for five or six days (Tr. II 15–20, 22).[3] Petitioner further alleged that, during his confinement, he heard English spoken and observed the presence of a person later identified as Special Agent Robert Palombo of the Drug Enforcement Administration (Tr. II 27, 34, 70–71; Tr. III 36–38). Petitioner did not contend that he was mistreated by agents of the United States after he had been delivered to their custody at the Buenos Aires airport on May 26, 1976 (Tr. II 38).

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[3] "Tr. II" refers to the transcript of the January 7, 1977, hearing. "Tr. III" refers to the transcript of the January 14, 1977, hearing. Upon their arrival in this country, petitioner and Miguel Russo had told the same district judge that they had not been abused by American agents in Argentina (May 27, 1976, Tr. 7–8).

Federal agents denied any participation, either directly or indirectly, in whatever mistreatment petitioner may have received from the Argentine authorities. Assistant United States Attorney Bernard Fried testified that, prior to petitioner's expulsion from Argentina, he had met with various officials of the Department of Justice, including an agent from the D.E.A. district office in Buenos Aires, to discuss the proper treatment of fugitives who might be expelled by the new government in Argentina (Tr. II 76–77). Fried personally conveyed the government's concern for proper treatment of such fugitives, in light of *United States* v. *Toscanino, supra,* to American officials in Argentina, including the United States Ambassador, and asked that they notify the Argentine government (Tr. II 77–81). Fried also stated that upon petitioner's arrival in the United States he questioned him about his treatment in Argentina and that, although petitioner claimed that he had been physically abused by the Argentinian police, he did not contend that he had seen any Americans during that time or that he had heard English spoken (Tr. II 87–89). In addition, Agent Palombo testified that he had never seen petitioner until petitioner had been brought aboard the airplane at Buenos Aires airport on the evening of May 26, 1976 (Tr. III 19–20).

After a full evidentiary hearing, the district court "reject[ed] the testimony of [petitioner] * * * concerning the presence of English-speaking people at the time of his arrest and during his incarceration in Argentina[,] believing it to be a fabrication crudely designed to fit the *Toscanino* standards for defeating



personal jurisdiction otherwise obtained over nonresident aliens" (Pet. App. 36) and rejected petitioner's testimony "that he was beaten repeatedly during" his period of incarceration in Argentina "as unworthy of belief" (*id.* at 35, n. *). The court instead found that (Pet. App. 36):

> the United States advised the Argentinian Government of the pending narcotic charges against Chiappe and others, and its intention of prosecuting the charges if it obtained jurisdiction over them. It urged the Argentinian Government to avoid any acts which might place United States jurisdiction over defendants in doubt. No United States official or agent participated in any decision relating to the time or manner of effecting Chiappe's arrest or his subsequent incarceration in Argentina. Nor was any American official or agent present at the time of Chiappe's arrest or during his incarceration in Argentina. The first contact any United States official or agent had with Chiappe was aboard the Braniff airplane at Buenos Aires Airport on May 26, 1976, at about 9:30 P.M. prior to take-off on its flight to John F. Kennedy International Airport.

These factual determinations, based on the district court's resolution of conflicting testimony, do not warrant further review. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635.[4]

[4] The district court did find that petitioner, believing that he was being kidnapped by guerrillas, had resisted arrest and as a result had been assaulted by Argentine police (Pet. App. 35). But the United States government "can hardly be expected to monitor the conduct of representatives of each foreign government" where it "plays no direct or substantial role in the misconduct and the

3. Petitioner contends (Pet. 23–32) that he was denied a fair trial because the government did not produce the Argentine court records of his prosecution for bank robbery in 1968.

At trial, Alberto Borsalino, an Argentine police official, testified that on May 17, 1968, he arrested petitioner and his wife on suspicion of bank robbery and seized a false identification card and a passport from petitioner and $19,000 from petitioner's wife, which she said had been given to her by petitioner (Tr. 952–954, 957, 976–977). Officer Borsalino further stated that petitioner had not been tortured while in his custody (Tr. 978–979). At a hearing during trial to determine the admissibility of the seized evidence, petitioner asserted that he was arrested on May 15, 1968, that he was tortured by Officer Borsalino, and that he had not given his wife the money (which the

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foreign police have acted not as United States agents but merely on behalf of their own government * * *." *United States* v. *Lira*, 515 F. 2d 68, 71 (C.A. 2), certiorari denied, 423 U.S. 847. Since, as the district court found, there was no United States involvement in the misconduct of the Argentine police, "no purpose would be served by holding the [United States] Government responsible for [those] actions" (*ibid.*). See *United States* v. *Toscanino*, *supra*, on remand, 398 F. Supp. 916, 917 (E.D. N.Y.). Nor is there merit to petitioner's claim (Pet. 14–15) that American authorities were "guilty of mistreatment and denial of procedural justice" because they kept petitioner blindfolded and strait-jacketed until at least 15 minutes into the flight to the United States. Since petitioner was under arrest, he was properly restrained until the plane was airborne. In any event, such restraint and blindfolding was not "outrageous and reprehensible" conduct requiring the extraordinary remedy of divestiture of the district court's jurisdiction. *United States ex rel. Lujan* v. *Gengler*, 510 F.2d 62, 65 (C.A. 2), certiorari denied, 421 U.S. 1001.



government claimed was the proceeds of petitioner's narcotics activities) (Tr. 812–818, 830, 834, 838–839).

Petitioner now contends that he was precluded from showing that Officer Borsalino testified falsely about the date of arrest, the fact of torture and the return of the $19,000 to petitioner's wife by the Argentine court because the government failed to produce the Argentine robbery file, as requested by the court and defense counsel. He further claims that certain of the Argentine court documents that he obtained after trial show that the prosecutor permitted Officer Borsalino "to give deliberately false testimony" (Pet. 26). These claims are not supported by the record.

To begin with, since the government did not possess the Argentine court records, their production was not required under *Brady* v. *Maryland*, 373 U.S. 83.[5]

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[5] During the hearing held to determine whether the evidence seized incident to the 1968 arrest was admissible, the district court asked the government to inquire whether any record was made "when [petitioner] complained to the judge and where a doctor talked about his injuries and what the judge said" (Tr. 836). Thus, the judge did not order production of the entire robbery case file, but rather asked the government to determine whether there was any record supporting or refuting petitioner's claim that he had been tortured and that he had complained about his treatment to an Argentine judge. Nevertheless, shortly thereafter, the court stated that it did not need the record to determine whether the evidence was admissible (Tr. 840–841). When defense counsel objected to the court's decision to rule on the motion without the Argentine documents, the court suggested that he produce them (Tr. 840–841). The court then found that the evidence was admissible because no American government agent had participated, directly or indirectly, in petitioner's arrest or search and because any acts of brutality were unrelated to the search and seizure (Tr. 844–845).

While an attorney for the government did review the file during a trip to Argentina, he simply made a cursory examination of approximately 2,000 pages of records written in Spanish, which he neither understood nor spoke, for the sole purpose of finding photographs and false identification. There is not a shred of evidence to suggest that the government attorney uncovered and then deliberately suppressed any exculpatory material. Indeed, during his examination of Judge Rene Niklison, who had been present during the prosecutor's review of the Argentine documents, petitioner made no showing that the records contained any material helpful to the defense or any evidence that contradicted Officer Borsalino's testimony.

Furthermore, the records were on file in a public building in Buenos Aires and hence were available to petitioner. His counsel was present in Argentina when the government attorney reviewed the documents, but he chose not to examine them (Tr. 771). When, during trial, the district court offered him "the rest of the week to fly down to Argentina" to examine the records, defense counsel declined the opportunity, responding "I have no need to" (Tr. 772). Petitioner's attorney also decided not to ask petitioner's counsel at his 1968 trial in Argentina to obtain the records for him.[6]

[6] During his trip to Argentina, defense counsel conferred with Dr. Baderman, the Argentine attorney who had represented petitioner at the time of the 1968 arrest (Tr. 253–254, 835–836). In denying petitioner's motion for a new trial based on the allegedly newly discovered evidence, the district court concluded that petitioner could have obtained the evidence prior to trial by the exercise of due diligence (March 4, 1977, Tr. 22).



In any event, the documents produced by petitioner in support of his motion for a new trial do not support his claim that Officer Borsalino lied at trial, much less that the government permitted the false testimony to be given. Even assuming that those records show that petitioner was arrested on May 15 instead of May 17, 1968, and that he may have been tortured while in the custody of the Argentine police, that does not prove that Officer Borsalino knowingly testified falsely about the date of arrest or that petitioner was tortured while he was in Borsalino's custody. Indeed, the district court expressly found that, although petitioner may have been physically abused by Argentinian officials, that mistreatment was unrelated to the arrest and search effected by Officer Borsalino (Tr. 844–845). Furthermore, none of the documents are or contain statements of Officer Borsalino, and therefore they could not have been used to impeach him.[7]

Finally, there is no substance to petitioner's claim that the government deliberately withheld information that the $19,000 was returned to petitioner's wife by an Argentine court as being "legitimately" her money. The 1968 robbery prosecution against petitioner and his wife had been "provisionally" dis-

[7] Petitioner misrepresents an exchange between defense counsel and the district court during Officer Borsalino's testimony at the mid-trial hearing (see Pet. 30). The judge's comments about "not [being] interested in nonsense" (Tr. 695) and his warnings to defense counsel not to waste time (Tr. 696, 698) related to questioning about the treatment accorded to petitioner's wife after the arrest and search, questioning that the judge correctly viewed as irrelevant to the admissibility of the evidence against petitioner.

missed by the Argentine court, but the case was subject to being reopened if new evidence was produced (Tr. 770). As a result, although the money was returned to petitioner's wife, there had been no official determination as to its origin. Petitioner was of course fully aware at trial that the court had returned the money (see Tr. 767–768), and the government made no effort to conceal that fact.

4. Petitioner contends (Pet. 19–23) that the district court abused its discretion in admitting into evidence certain items seized after the termination of the conspiracy that allegedly were unrelated to the narcotics offense.

As noted above, the government introduced a false passport and identification papers seized from petitioner and $19,000 seized from his wife incident to their arrest by Argentine authorities on May 17, 1968. Photographs showing petitioner together with co-conspirators Nicoli and Rossi, which had been seized during a subsequent search of petitioner's residence later that day, were also admitted. These evidentiary rulings were correct.

A district court has wide discretion in determining whether the probative value of relevant evidence is outweighed by the danger of unfair prejudice (*United States* v. *Cowsen*, 530 F. 2d 734, 738 (C.A. 7), certiorari denied, 426 U.S. 906; *United States* v. *Ravich*, 421 F. 2d 1196, 1204–1205 (C.A. 2), certiorari denied, 400 U.S. 834), and the decision to admit such evidence will not be disturbed on appeal unless it is clear that the probative value of the evidence is "substantially



outweighed" by its prejudicial effect. See, *e.g.*, Fed. R. Evid. 403; *United States* v. *Wixom*, 529 F. 2d 217, 220 (C.A. 8); *United States* v. *Fairchild*, 526 F. 2d 185, 189 (C.A. 7), certiorari denied, 425 U.S. 942.

The photographs were strong evidence that petitioner knew the other co-conspirators at the time of the conspiracy. Likewise, the false passport and the identification papers, even assuming that they were never used in the narcotics conspiracy, were similar to the implements used by the conspirators to smuggle the heroin and hence were admissible "to establish opportunity or preparation to commit the crime charged * * *." *United States* v. *Ravich*, *supra*, 421 F. 2d at 1204. See also *United States* v. *Robinson*, 560 F. 2d 507, 513 (C.A. 2) (*en banc*), certiorari denied, No. 77–5466, February 27, 1978; *United States* v. *Wiener*, 534 F. 2d 15, 18 (C.A. 2), certiorari denied, 429 U.S. 820; *United States* v. *Walters*, 477 F. 2d 386, 388–389 (C.A. 9), certiorari denied, 414 U.S. 1007; *United States* v. *Baker*, 419 F. 2d 83, 86–87 (C.A. 2), certiorari denied, 397 U.S. 976.

Finally, the money seized from petitioner's wife was properly admitted as circumstantial evidence of petitioner's participation in the conspiracy.[8] *United*

[8] Contrary to petitioner's apparent suggestion (Pet. 20), it was unnecessary for the government to show that petitioner's wife was involved in the conspiracy. Although the $19,000 in United States currency was seized from petitioner's wife, it was admitted into evidence as money possessed by him on the basis of his wife's statement that he had given the money to her (Tr. 957). The court immediately instructed the jury that petitioner "is not bound by what his wife said unless under all the circumstances you find that [she] was authorized to speak for [him] with reference to the ownership

*States* v. *Magnano,* 543 F. 2d 431, 437 (C.A. 2), certiorari denied, 429 U.S. 1091; *United States* v. *Tramunti,* 513 F. 2d 1087, 1105 (C.A. 2), certiorari denied, 423 U.S. 832; *United States* v. *Kenny,* 462 F. 2d 1205, 1219 (C.A. 3), certiorari denied *sub nom. Kropke* v. *United States,* 409 U.S. 914. Although the money was seized approximately three months after the termination of the conspiracy and was thought by Argentine police to be the proceeds of a bank robbery (Tr. 970–971), these factors affected only the weight, not the admissibility, of the evidence. See *United States* v. *Tramunti, supra,* 513 F. 2d at 1105. As the trial judge observed, the fact that the seizure occurred in the course of a bank robbery investigation "doesn't mean the articles seized are unrelated to the deal in narcotics" (Tr. 961).

5. Finally, petitioner's claim (Pet. 32) that he was denied effective assistance of counsel is insubstantial.[9] His counsel's failure to obtain the court files in Argentina would be significant only if petitioner was prejudiced by the oversight, but, as discussed above, petitioner has made no showing that those files support his claim that the government deliberately suppressed exculpatory evidence or that Officer Borsalino intentionally testified falsely. Indeed, the district court concluded "with absolute certainty" that the file "could not have changed the verdict" (March 4, 1977, Tr. 23).

Similarly, as to petitioner's claim that the prosecution was barred by the statute of limitations, this defense was raised by petitioner's attorney at trial and rejected by the jury. The evidence proved that a conspiracy involving petitioner continued until February 16, 1968, which was less than five years prior to return of the indictment.

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of that money" (Tr. 957). See Fed. R. Evid. 801(d)(2)(C). Moreover, as noted above, the return of the money to petitioner's wife by the Argentine court did not render it inadmissible. Petitioner erroneously characterizes that return as a determination that the money "legitimately" belonged to his wife (Pet. 21), whereas the court had simply dismissed the bank robbery case because of lack of evidence.

[9] Petitioner's present counsel was associated with his trial counsel until the latter's recent death.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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